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No. 85-

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

W. D. DINWIDDIE, JOE LEWIS AND TOM KENNAN,
PETITIONERS,

VS.

THE BOARD OF COUNTY COMMISSIONERS OF LEA COUNTY, W. H. BRININSTOOL, ERNEST McNUTT, AND BILLY W. JOHNSON, COMMISSIONERS; STERN BROTHERS AND COMPANY, AND PAT SNIPES, COUNTY CLERK OF LEA COUNTY, NEW MEXICO,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

W.D. Dinwiddie, Joe Lewis and Tom Kennan, by and through their attorney, William A. L'Esperance, petition herein for a Writ of Certiorari to review the decision of the Supreme Court of the State of New Mexico affirming the lower court

dismissal of their "Petition for Declaratory Judgment Invalidating the Special Election of September 18, 1984, and Disallowing Certain Invalid Ballots Cast at Said Election."

The underlying class action specifically questions the validity of a certain election for bonds to construct a coliseum facility in Lea County, New Mexico, by pointing out the total failure of state officials to comply with mandatory statutory requirements to publish notice of a pre-election consolidation of precincts and to notify the Secretary of State of said consolidation, in violation of petitioners' substantive right under the Fourteenth Amendment to the United States Constitution to Due Process of Law.

Petitioners further contend that the New Mexico State Supreme Court violated their procedural right, under the same Fourteenth Amendment Due Process of Law clause, by thereafter refusing or otherwise failing to decide the above issue of the validity of an election void, *ab initio*, in accord with its own case precedent.

OPINION BELOW

The Opinion of the Supreme Court of the State of New Mexico filed November 12, 1985, affirming the District Court's dismissal of the underlying petition, is reprinted in full as Appendix A hereto. The opinion is, to date published as: ——— —— N.M. ———————, 708 P.2d 1043 (N.M. 1985).

JURISDICTION

The Opinion appealed from was filed November 12, 1985; Motion for Rehearing was denied November 26, 1985; the time for this petition was extended by Order A-569, dated January 27, 1986, signed by Mr. Justice Byron R. White. The jurisdiction

of this Court is invoked under 42 U.S.C. Section 1302 and 28 U.S.C. Section 2101 (c).

CONSTITUTIONAL PROVISION INVOLVED

The first section of the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "...nor shall any State deprive any person of life, liberty, or property, without due process of law;..."

STATEMENT OF THE CASE

A special election was held September 18, 1984, for a general obligation bond to cover the construction of a public building in Lea County, New Mexico. Certain precincts within the county were purportedly consolidated prior to the election, but such consolidation is hereby asserted to have been in violation of certain mandatory statutory provisions, thereby rendering the election void.

Also, certain numerous persons, not residents of Lea County, being students of a Junior College, were wrongfully registered and allowed to vote in the above election, which it is asserted is in clear violation of the rights of the class of true residents represented by petitioners in that the voidable ballots of the non-resident students dramatically affected the outcome of the above election by severely diluting the votes of the class.

Following the above election, petitioners herein filed their underlying petition for Declaratory Judgment in the State District Court. In an opinion of first impression, the District Court dismissed the petition. The New Mexico Supreme Court, on appeal, refused to reach the merits of the petition, taking rather an alternate route by dismissing the petition for

lack of a verification required to contest the voidability of an election. It is asserted that the State Supreme Court never addressed the question of the election as void, *ab initio*, nor did it address a precedential case on point.

The petition was dismissed in an Opinion filed November 12, 1985; rehearing was denied November 26, 1985 and mandate issued that same day.

REASONS FOR GRANTING THE WRIT

The decision below significantly undercuts petitioners' Fourteenth Amendment right not to have their votes diluted by unqualified voters and raises an important constitutional question not previously decided by this Court, to wit: whether the failure of a state supreme court to review a petition to invalidate a void election violates the due process clause of the Fourteenth Amendment to the United States Constitution.

On the campus of the New Mexico Junior College which is located in Lea County, New Mexico, an organized effort was made to register the college students to vote in Lea County elections. Whether by willful design or otherwise, students who lived outside the county were persuaded to register and give their "residence" as their local address. Such a practice is specifically prohibited by State Law which declares that a student who matriculates in a New Mexico educational institution does not "gain...residence...while a student....."

Crosschecking the names of these students with the voting registration records by the Lea County Deputy Clerk gave petitioners reasonable cause to believe that there were numerous illegal votes cast at the special election of September 18, 1984, wherein the voters of Lea County were asked to approve the issuance of general obligation bonds for the purpose of building a coliseum.

Prior to that date, on July 18, 1984, the attorneys for the responsible state officials gave warning to said officials that they had not followed the mandatory provisions of the New Mexico statutes with reference to the consolidation of precincts at the upcoming bond election. The applicable statutes which are governing in this case are as follows:

> Section 1-3-5, N.M.S.A. 1978. "Precincts; powers of county commissioners.
>
> No precinct shall be created, divided, abolished or *consolidated* or the boundaries or polling place therein changed less than *four months* prior to each election, except by order of the district court."
>
> Section 1-3-8, N.M.S.A. 1978. "Precinct changes; notice and publication.
>
> Upon the adoption of any resolution, or upon the final action of any district court upon a petition creating, abolishing, dividing or *consolidating* any precinct, or changing any precinct boundary or changing any designated polling place, the board of county commissioners *shall*:
>
> A. send a certified copy of the resolution or court order to the secretary of state and to the county chairman of each of the major political parties; and
>
> B. publish once the resolution in a newspaper as provided in the Election Code." (emphasis added.)

In *Weldon v. Sanders*, 99 N.M. 160, 655 P.2d 1004 (1982), Judge Neal, writing for the court and discussing these sections states the word "shall" is mandatory.

In the case at bar, the county commissioners violated the mandatory provisions with respect to consolidation of precincts by attempting to consolidate (1) less than four

months prior to the time for the election; (2) without publishing the resolution; (3) without sending a certified copy of the resolution to the Secretary of State; (4) without securing any order of the district court permitting the consolidation.

This case is clearly controlled by the precedent of *Wiggins v. Lopez*, 73 N.M. 224, 387 P.2d 330 (1963). In that case a local bond election was held void when the local board failed to publish notice in accordance with the statute. This was true even though a significant amount of other publication and posting of notice occurred. The Supreme Court held that substantial compliance, short of actual compliance, with mandatory provisions involving such elections is not sufficient.

Respondents herein chose to ignore the warning of their attorney and proceeded toward the September election without any compliance with the statute. There were substantial breaches of the law in bringing this election before the public, and the failure to observe the law with respect to consolidation of precincts resulted in a void election under New Mexico law.

It is herein contended that the respondents' acts rendered the electoral process so Constitutionally deficient as to violate the Due Process Clause of the Fourteenth Amendment. The fundamental fairness of the electoral process is fully undermined by the avoidance by various state officials of the mandatory substantive statutes cited above.

In many other states of this Union, a pre-election requirement to publish notice of the consolidation of precincts for election is mandatory.

In Texas, the Court of Civil Appeals recently ruled that a mandatory statute requiring proper notice of polling places for a special election in a utility district was not merely directory, and declared the election void for failure of compliance.

Greater Beauxart Garden, Etc. v. Cormier, 596 S.W.2d 597 (1980). See also *In the Matter of D'Addario v. McNab*, 295 N.E.2d 792, 32 N.Y.2d 84 (1973); *Richmond County Business Ass'n v. Richmond County*, 155 S.E.2d 395, 223 Ga.337 (1967); *Glover v. Russell*, 542 S.W.2d 751 (Ark., 1976).

The Federal Circuits have reached conflicting results, even within circuits, on whether to declare an election void where a mandatory state statute involving the location of polling places has been violated.

In *Griffin v. Burns*, 570 F.2d 1065 (1st Cir., 1978), the court ordered a new election for violation of what was viewed as a mandatory absentee ballot statute, where the dilution of the value of the votes cast violated a sense of fundamental fairness.

In *Duncan v. Poythress*, 657 F.2d 691 (5th Cir., 1981), a mandatory provision for holding a special election to elect a replacement for a state supreme court justice was enforced and an election ordered in another instance of a state election practice being so fundamentally unfair, in contravention of state statute as to make federal intervention appropriate.

Likewise a federal remedy exists where a sham candidate is elected, resigns, and the appointment of his successor deprives the electorate of a right to vote. *Smith v. Cherry*, 489 F.2d 1098 (7th Cir., 1973), cert den. 417 U.S. 910, 94 Sup. Ct. 2607, 41 L.Ed.2d 214 (1974). And a failure to notify resulted in a new election being ordered by the same circuit in *Briscoe v. Kusper*, 435 F.2d 1046 (7th Cir., 1970).

On the contrary side, the Fifth Circuit in *Welch v. McKenzie*, 765 F.2d 1311 (1985), refused to declare an election void where mere ballot counting, procedural errors were asserted and no clear racial or other prejudice was demonstrated.

The most similar federal case appears to be *Ury v. Santee*, 303 F. Supp. 119 (N.D.Ill. 1969), where the precincts were

consolidated from 32 to 6 without proper compliance with a mandatory, statutory notice requirement, and the District Court declared the election void.

The holding in the Court, to date, is that a statute authorizing the issuance of local bonds does not retroactively give validity to a void election. *South Ottawa v. Perkins*, 94 U.S. 260, 24 L.Ed. 154 (1877). And so, the principal question of substantive due process herein becomes a matter of first impression with this Court.

The New Mexico Supreme Court refused to decide the case upon its merits, declining to discuss the actual statutes in question, cited above, and totally ignoring its own case, *Wiggins v. Lopez*, supra., cited as precedent in all the briefs and motions addressing the mandatory provisions at issue.

Wording in statutes should be interpreted in accordance with its plain and ordinary meaning unless clear, contrary legislative intent is shown. *United States v. Apfelbaum*, 445 U.S. 115, 100 S.Ct. 948, 63 L.Ed.2d 250 (1980).

The underlying petition sought to have the election declared void for a substantive reason: that the decision of state officials to dispense with the required publication was deliberate, knowing and in clear violation of the mandatory statute. By viewing the substantive issue in petitioners' complaint as merely procedural, the State Supreme Court violated petitioners' Due Process right to have had a decision on the merits and to have had the election in question declared void, *ab initio*.

This Court will historically require a state court of last resort to hear a case on the merits when that court's failure to do so denies substantive due process, as in the case at bar. *State of Minnesota v. National Tea Co.*, 309 U.S. 551, 60 S.Ct. 676, 84 L.Ed. 920 (1940); See *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964).

The federal judiciary will intervene to uphold the fundamental fairness requirements of substantive due process as embodied in the Fourteenth Amendment where a failure to enforce a statute or case precedent creates broad-gauged unfairness that infects the results of a local election. c.f. *Brown v. Post*, 279 F.Supp. 60 (W.D.La. 1968).

This Court is only asked here to require a state court of last resort to comply with the Due Process requirement by reviewing its own state statutes and caselaw.

The New Mexico Supreme Court ought not to be allowed to avoid a decision on the merits, where a mandatory election statute has been violated and where the votes of many residents of the impacted county have been diluted, by resort to an inapplicable procedure related to mere election contests.

Is the election any less void because the petition herein is unverified? Clearly this question deserves a negative answer.

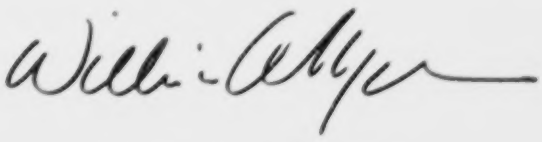
CONCLUSION

The election in question was void, *ab initio*, due to total lack of compliance by state officials with the mandatory requirements of the laws regarding precinct consolidation. This is a substantive due process violation.

The failure to the New Mexico Supreme Court to address this issue deprived the class represented by petitioners of significant rights under the Fourteenth Amendment.

The matter must be remanded to the New Mexico Supreme Court for a real decision on the merits.

Respectfully submitted,



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APPENDIX A

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO
(Filed November 12, 1985)

No. 15,808

APPEAL FROM THE DISTRICT COURT OF LEA COUNTY
William J. Schnedar, District Judge

W.D. DINWIDDIE, JOE LEWIS
and TOM KENNAN,
Plaintiffs-Appellants,

vs.

THE BOARD OF COUNTY COMMISSIONERS
OF LEA COUNTY, W.H. BRININSTOOL,
ERNEST McNUTT, and BILLY W. JOHNSON,
Commissioners; STERN BROTHERS AND COMPANY,
and PAT SNIPES, County Clerk of Lea County,
New Mexico,
Defendants-Appellees.

William F. Brainard
Roswell, NM — For Appellants

Hinkle, Cox, Eaton, Coffield & Hensley
Mack Easley
Santa Fe, NM — For Appellees

OPINION

FEDERICI, Chief Justice.

Plaintiffs-appellants W.D. Dinwiddie, Joe Lewis and Tom Kennan (plaintiffs), filed in the District Court of Lea County a "Petition for Declaratory Judgment Invalidating the Special Election of September 18, 1984, and Disallowing Certain Invalid Ballots Cast at Said Election." They alleged that a bond election called by the Board of County Commissioners of Lea County (Board), for the construction of a cultural center was held in violation of the statutory provisions for the consolidation of precincts and that certain ballots were cast by persons invalidly registered in Lea County. The Board, the Commissioners of the Board, individually, and Pat Snipes, County Clerk of Lea County, defendants-appellees (defendants), filed a motion to dismiss. The trial court dismissed plaintiffs' complaint with prejudice, and plaintiffs appeal. We affirm.

The trial court determined that plaintiffs' unverified complaint violated the requirements of NMSA 1978, Section 1-14-3 (Repl. 1985) regarding verification of a complaint in an election contest; that it lacked essential averments concerning the outcome of the election; and that it failed to state a claim for relief.

The sole issue we address on appeal is whether the statutory provisions concerning election contests and recounts, NMSA 1978, Sections 1-14-1 to -21 (Repl.1985), and in particular Section 1-14-3, apply to a petition which contests the validity of a special bond election for the construction of a cultural facility. We do not address the other issues raised by plaintiffs because we find this issue dispositive.

Plaintiffs contend that the contest and recount provisions are applicable only to contests of elections of candidates for public office. They argue that because these provisions are primarily

addressed to a "candidate" or "party," they do not apply to bond elections and that Section 1-14-1 gives standing to file an election contest only to an "unsuccessful candidate." We determine that these provisions are not so limited in scope.

NMSA 1978, Section 1-1-19 (Repl.1985) provides:

> 1-1-19. Elections covered by code.
>
> A. The Election Code (this chapter) applies to the following:
>
> (1) general elections;
> (2) primary elections;
> (3) statewide special elections;
> (4) elections to fill vacancies in the office of representative in congress; and
> (5) school district elections.
>
> B. *To the extent procedures are incorporated or adopted by reference by separate laws governing such elections* or to the extent procedures are not specified by such laws, certain provisions of the Election Code shall also apply to:
>
> (1) municipal officer or municipal bond elections; or
> (2) special district officer or *special district bond or other special district elections.* (Emphasis added.)

Thus, the Election Code, Chapter 1 NMSA 1978, applies to special district bond elections when the Code procedures are incorporated by reference in the separate laws governing such elections.

The separate laws governing bond elections for cultural facilities are found in NMSA 1978, Sections 4-49-1 to -21 (Repl.Pamp.1984 and Supp.1985). Section 4-49-7 (Supp.1985) authorizes the issuance of general obligation bonds for cultural

facilities. NMSA 1978, Section 4-49-8 (Supp.1985) sets forth the requirements for the bond elections and states in pertinent part: "Except as provided in Chapter 4, Article 49 NMSA 1978, such elections shall be held and conducted in the same manner as general elections, *including recount and contest....*" (Emphasis added.) Article 49 contains no separate recount or contest provisions. In addition, NMSA 1978, Section 4-49-10 (Repl.Pamp.1984) provides that all such bond elections shall be "in all respects governed by, and the result declared according to, the rules and regulations provided by law for holding ordinary or general elections." The Election Code's provisions, including those for recount and contest, therefore, do apply to special bond elections for cultural facilities, since they are specifically incorporated by reference by the laws governing such elections.

Plaintiffs claim that their complaint contained two causes of action: the first, a challenge to the validity of the election itself; and the second, a challenge to the results. They argue that should the contest and recount statutes of the Election Code apply to the second cause of action, the first cause of action is still "outside" the Code and not affected. We do not agree with this distinction. A challenge to the validity of an election is also a challenge to its result, for if it is successful, the result is changed. Similarly, a challenge to the result contests the inherent validity of the election. Both seek to alter the certified result of the election. An election is a process, not a single event, and the whole process or any part of it, may be subject to contest. *See generally* 26 Am.Jur.2d *Elections* § 321 (1966).

The appellants in *Hartley v. Board of County Commissioners*, 62 N.M. 281, 308 P.2d 994 (1957), also argued that the proceeding brought by them, challenging an election, was not an election contest because they had alleged fraud and impairment of property rights. The *Hartley* Court stated: "Although the action may be denominated an equitable

proceeding, its character remains unchanged, an action to contest an election." *Id.* at 283, 308 P.2d at 995. Likewise in the present case, we determine that the character of both causes of action, whether directed to the validity or the result of the election, is that of an election contest.

The right to contest an election is entirely statutory; such a proceeding was unknown at common law. *Montoya v. McManus*, 68 N.M. 381, 362 P.2d 771 (1961); *Crist v. Abbott*, 22 N.M. 417, 163 P. 1085 (1917). The statutory provisions for an election contest must be strictly followed. *Montoya v. McManus*. One has the right to contest an election only in the manner and to the extent prescribed by statute. *Id.; State ex rel. Denton v. Vinyard*, 55 N.M. 205, 230 P.2d 238 (1951). This Court has long recognized that an election contest may not be brought absent statutory authority. In *Montoya v. Gurule*, 39 N.M. 42, 38 P.2d 1118 (1934), we held that the district court was without jurisdiction to entertain a contest of an election of members to a board of trustees of a land grant, because the Election Code at that time did not place such an election within its scope. Similarly, in *State v. ex rel. Denton v. Vinyard*, the Election Code was determined not to apply to a contest of a local option election, since there was no provision in the Code or other related statutes providing for such contests. *See also Hartley v. Board of County Commissioners* (no statutory provision for contest of an annexation election; complaint dismissed).

In the instant case, an election contest may be brought only because the laws governing the issuance of special bonds for cultural facilities incorporate the Code procedures, including those for contest and recount. This statutory right, however, may be exercised only in strict conformity with the law.

NMSA 1978, Section 1-14-3 (Repl.1985) of the Election Code's contest and recount provisions states in part: "Any action to contest an election shall be commenced by filing a

verified complaint of contest in the district court...." (Emphasis added.) Plaintiffs' complaint was not verified. It has long been established in New Mexico that in election contests the statutory requirement of verification of the complaint must be met or the case is subject to dismissal or to a motion for judgment on the pleadings. *Hyde v. Bryan*, 24 N.M. 457, 174 P. 419 (1918). *See also Perez v. Sisneros*, 74 N.M. 310, 393 P.2d 335 (1964) (unverified reply of contestant would have been subject to motion to strike or judgment on the pleadings as to new matter alleged in answer, had the contestee raised the issue in the trial court).

Other courts have held that they did not have jurisdiction to hear an election contest under similar circumstances. In a recent Indiana case, *State ex rel. Hodges v. Kosciusko Circuit Court*, 273 Ind. 101, 402 N.E.2d 1231 (1980), the court held that an unverified petition to recount votes and to contest an election was jurisdictionally defective and could not be amended after the filing deadline to conform with the jurisdictional requirements. Also, the Illinois Supreme Court in *Doelling v. Board of Education*, 17 Ill.2d 145, 160 N.E.2d 801 (1959), dismissed for lack of jurisdiction an election contest initiated by an unverified petition. *See also Reed v. Baker*, 254 Ark. 631, 495 S.W.2d 849 (1973) (required affidavit in support of an election contest is jurisdictional).

Plaintiffs argue that they should be allowed to amend their complaint under NMSA 1978, Civ.P.Rule 15(a) (Repl.Pamp.-1980). We agree with defendants that plaintiffs do not have a right to amend, since the 30-day period in which to file a "verified" complaint has expired. § 1-14-3. After the 30-day period, the courts have no jurisdiction over the matter.

Plaintiffs' petition did not invoke the jurisdiction of the court, because it was not verified in accordance with NMSA 1978, Section 1-14-3 (Repl.1985). The trial court's dismissal of plaintiffs' complaint is affirmed.